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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC 19 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115
	)	
Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Service	)	CC Docket No. 94-46 RM 8367
	)	
Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service	)	CC Docket No. 93-116

PETITION FOR RECONSIDERATION
OF
PRONET INC.

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SUMMARY

In this petition, ProNet Inc. ("ProNet") seeks reconsideration of three provisions of the R&O which adversely affect conventional, radio common carrier paging. First, the Commission must continue processing pending 931 MHz applications and those applications that were previously granted (but are subject to pending petitions for reconsideration or review) pursuant to the existing rules in order to avoid substantially prejudicing pending 931 MHz applications. Second, the "one frequency at a time" policy recodified in the R&O will obstruct consolidation among paging carriers and confer an unfair competitive advantage on narrowband PCS. Finally, the R&O's definitions of "initial" and "modification" 931 MHz applications prejudices 931 MHz carriers as compared to 929 MHz and narrowband PCS carriers, while also inhibiting expansion of local and regional 931 MHz systems.

Processing of Pending 931 MHz Applications

The R&O imposes a completely new application processing and assignment scheme for 931 MHz Public Mobile Service paging applications. The new licensing scheme applies to "pending" 931 MHz applications, broadly defined to include routine applications that have been accepted for filing and which have elicited neither petitions to deny nor mutually exclusive applications, and previously granted 931 MHz applications that are the subject of pending petitions for reconsideration and review.

No "reasoned analysis" is supplied by the R&O for imposing this new processing procedure retroactively on the first category

of "pending" applications, which, but for the advent of this new procedure, would be granted in due course. Regarding the second category, the R&O agrees that, rather than retroactive application of the new procedure, these cases should be resolved under existing law. Notwithstanding this determination, however, the R&O concludes that the Commission may not be able to resolve certain of these cases under existing law and, as a result, they should be subject to the new procedure. This wide open exception is illogical, contrary to the Act and unfair; on reconsideration, it should be scrapped.

"One Frequency at a Time" Policy

The R&O recodifies the "one frequency at a time" policy established by predecessor Rule 22.525. The Commission has previously held that its "one frequency at a time" policy governs applications acquired incident to a bona fide sale of an ongoing business. Applying this policy to applications acquired incident to a bona fide sale will obstruct consolidation among paging carriers by either delaying these legitimate business transactions until applications are granted and facilities are constructed or compelling sellers to discount the value of their pending applications to zero. For this reason, the policy should, at a minimum, be revised to include an exception for "incidental" applications.

"One frequency at a time" will also unjustly confer a competitive advantage on narrowband PCS carriers. Narrowband PCS carriers may aggregate as much as 300 kHz of spectrum and

simultaneously prosecute applications in overlapping markets while "one frequency at a time" limits RCC carriers to prosecuting a single 20 kHz additional channel application per geographic area. Due to this discriminatory treatment of conventional RCC operators and narrowband PCS carriers, the Commission should consider repealing its "one frequency at a time policy."

Definitions of "Initial" and "Modification"
931 MHz Applications

The R&O's definitions of "initial" and "modification" 931 MHz applications should be reformulated because they will impede the growth of expanding local and regional 931 MHz systems by subjecting them to the risks and vagaries of mutually exclusive applications and petitions to deny. The new definitions also discriminate against 931 MHz paging as compared to 929 MHz paging and narrowband PCS: 929 MHz carriers on exclusive frequencies are immunized from competing mutually exclusive applications; and narrowband PCS, which is licensed by market area, is free from this threat of mutually exclusive applications when expanding in its market area. All of these services, however, under the CMRS classification, are subject to comparable technical and operational requirements. To realize this goal and avoid such prejudice to 931 MHz carriers, the R&O's definitions must be reformulated.

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PETITION FOR RECONSIDERATION
OF
PRONET INC.

ProNet Inc. ("ProNet"), by its attorneys and in accordance with the Commission's Rules, hereby petitions the Commission to reconsider and modify the Report and Order ("R&O") in the above-captioned proceeding as proposed herein. Specifically, the Commission should reconsider:

- imposing new 931 MHz application processing procedures retroactively on pending 931 MHz applications;
- strict application of Rules 22.536 and 22.569 to applications acquired as an incidental part of a bona fide sale of an ongoing business; and
- establishing new definitions for "initial" and "modification" with respect to 931 MHz applications.

The policies and rules for which ProNet seeks reconsideration, as established and adopted by the R&O, will preclude efficient assignment of new licenses, will substantially impede competition between paging carriers and other mobile communications providers, and will otherwise undermine the Commission's policy goals for a vibrant and expanding paging industry. Therefore, the Commission should reconsider and revise the R&O in accordance with the analysis and conclusions set forth herein.

I. STATEMENT OF INTEREST

Either directly or through wholly-owned subsidiaries, ProNet provides high-quality paging on several wide-area, radio common carrier ("RCC") networks in various mid-Atlantic and New England states, and in the greater Chicago metropolitan area.[1/] These networks utilize VHF, UHF and 931 MHz channels. Electronic Tracking Systems, Inc. ("ETS"), a wholly-owned ProNet subsidiary, is prosecuting 931 MHz applications at fourteen separate locations in Texas. Based on these interests and on its broad experience in constructing and operating wide-area paging networks, ProNet has a vital stake in the rules and policies imposed on RCC paging, especially 931 MHz paging, by the R&O.

1/ In addition, ProNet, either directly or through its subsidiaries, is a licensee in the Commission's Private Radio Service, holding Special Emergency, Business Radio and Private Carrier Paging authorizations.

II. THE COMMISSION MUST CONTINUE PROCESSING PENDING 931 MHz APPLICATIONS PURSUANT TO EXISTING RULES

Adopting concepts first introduced in a Further Notice of Proposed Rulemaking ("FNPRM"),[2/] the R&O imposes a completely new application processing and assignment scheme for 931 MHz Public Mobile Service paging applications. The new licensing scheme will govern both 931 MHz applications filed subsequent to the effective date of the rules adopted by the R&O, and "pending applications," which have been defined to include both:

- applications that have been filed but have yet to be acted on by the Commission; as well as
- applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review.

Regarding the first category of applications, the R&O provides no "reasoned basis" for retroactively imposing the new processing procedure. Indeed, for these applications, the new procedure is certain to wreak havoc on a generally workable status quo, while inflicting substantial prejudice on applications that, but for advent of the new regime, are on the verge of being granted.

Subjecting the second category of applications to the new scheme is equally detrimental. As previously explained in ProNet's response to the FNPRM, abruptly transforming construction authorizations that are subject to petitions for reconsideration or

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2/ Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services (Further Notice of Proposed Rulemaking in CC Docket No. 92-115), 9 FCC Rcd 2596 (1994).

review into newly filed applications is ultra vires the Commission's statutory power and exceedingly unfair. While seemingly conceding the validity of ProNet's argument, the R&O qualifies that acknowledgement with an exception of virtually unlimited proportions. That exception must be reconsidered and rescinded so that all previously granted 931 MHz applications are resolved by the agency in the same manner.

A. The R&O Provides No Reasoned Basis For Subjecting Routine 931 MHz Applications To New Processing Procedure

An agency undertaking to alter its regulatory course must supply a "reasoned analysis" for its decision.[3/] A "barebones incantation" of a rationale is an inadequate basis for altering long-established policy.[4/] And when changing a fundamental component of its regulatory framework, the Commission is duty-bound to address significant issues raised by commenting parties.[5/] As for subjecting routine, pending 931 MHz applications that have been accepted for filing and have elicited neither petitions to deny nor mutually exclusive applications to an entirely new processing scheme, the R&O satisfies none of these minimally sufficient requirements for reasoned decisionmaking.

[3/] Action For Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987), citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); accord Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[4/] Action For Children's Television, 821 F.2d at 746.

[5/] Telecommunications Research And Action Ctr. v. FCC, 836 F.2d 1349, 1354 (D.C. Cir. 1988).

Neither the FNPRM nor the R&O provide a comprehensible rationale for transforming routine, partially processed 931 MHz applications into "newly-filed" ones. The FNPRM's "explanation" is limited to the following:

> These proceedings [i.e., major market 931 MHz applications which have been subjected to lotteries, or for which lotteries are pending] present issues we did not foresee in Paging Systems-DPLMRS and have made it difficult to process these applications in a consistent, satisfactorily [sic] manner. [Footnote omitted.] In particular, the current Part 22 rules may not provide sufficient guidance to inform applicants when 931 MHz spectrum that becomes available will be available for assignment to already pending applications.

The omitted footnote cites to Public Mobile Services Lottery, 5 FCC Rcd 7430 (Com. Car. Bur. 1990), app. for review pending, and O.R. Eastman, 5 FCC Rcd 7423 (Com. Car. Bur. 1990), both of which deal exclusively with Lottery No. PMS-31 for 931 MHz authorizations in metropolitan New York City.[6/]

The R&O offers only a single sentence for the radical change in processing it foists upon all routinely pending 931 MHz applications:

> The confusion and uncertainty surrounding the old procedures for processing these applications require a rational "fresh start" pursuant to clearly articulated rules.[7/]

[6/] The omitted footnote also cites to "Valley Communications, 5 FCC Rcd 5274 (Mob. Serv. Div. 1990)." This reference pertains to a Notice of Apparent Liability issued to Valley Mobile Communications, Inc., a licensee of two Public Land Mobile Stations in the 152 MHz band. Accordingly, this citation is presumed to be in error.

[7/] R&O, ¶ 98.

Thus, reduced to its core, the Commission's rationale for fundamentally changing application processing rules for routine 931 MHz applications is that the New York 931 MHz lottery created unforeseeable issues making it difficult to process these applications and requiring a "'fresh start' pursuant to clearly articulated rules." Stated differently, a single, aberrant lottery involving New York City suffices to turn all 931 MHz processing upside down. Why conflict in a single market justifies imposing onerous new rules on thousands of routine applications involving scores of markets other than New York is never explained by the Commission.

Nor could it. Under the so-called confusion and uncertainty of the "old procedures," the Commission has processed its backlog of routine 931 MHz applications in an orderly, regular manner. In the weeks since it released the R&O, for example, the Commission granted roughly 360 applications in the 931 MHz band-- hardly proof that confusing and uncertain procedures are interfering with normal processing. By failing to reconcile this empirical fact with its rhetorical justification for fundamentally changing 931 MHz processing, the Commission "crosses the line from 'the tolerably terse to the intolerably mute.'"[8/] Accordingly, the new processing scheme, as applied to pending 931 MHz applications, lacks a minimally acceptable rational basis and must be repealed.

8/ Action for Children's Television, 821 F.2d at 746, citing Greater Boston Television Corp., 444 F.2d at 851-52.

B. New 931 MHz Processing Procedures Must Be Stayed Until All Pending Petitions Are Resolved

The R&O, accepting the FNPRM comments of ProNet and others, has declined to impose retroactively its new processing scheme on all previously granted 931 MHz applications that are subject to pending petitions for reconsideration and applications for review.[9/] Rather, the R&O held that these cases should be decided under existing rules, and directed the Common Carrier Bureau to resolve or prepare for Commission resolution all such disputes before the new rules become effective on January 1, 1995.[10/] To this well-reasoned decision, which took into account "significant issues" raised by commenting parties, the Commission added a puzzling and contradictory caveat:

> Because of the ambiguous and confusing nature of our existing rules and related practice and precedent, however, it may not be possible to resolve some of these cases under the existing rules. In such cases, we see no alternative but to return the applications, even if initially granted, to pending status on the grounds that granting, denying, or dismissing applications pursuant to such ambiguous and confusing rules could only lead to reversal, regardless of what action we take.[11/]

9/ In its Comments in response to the FNPRM (filed June 20, 1994), ProNet contended (at 5) that:

> [T]he new 931 MHz processing procedures recommended by the FNPRM should be scrapped, especially as applied to incumbent licensees subject to petitions for reconsideration or review. Agency resources should be focused instead on swiftly resolving these petitions in accordance with 931 MHz licensing procedures as initially established, applied and interpreted by the Commission.

10/ R&O, ¶¶ 98-99. With roughly two weeks until the new rules become effective, no decisions on these cases have been released.

11/ Id. ¶ 98.

This statement, however, is itself confusing and ambiguous, and, as a result, cannot constitute a reasoned basis for dividing the previously granted 931 MHz applications subject to petitions into two categories-- those that can be decided under existing law and those that cannot. If "existing rules and related practice and precedent" are ambiguous and confusing with respect to some of the previously granted 931 MHz applications, how can they be understandable and intelligible with respect to others. The inherent contradiction of the R&O's attempted differentiation between previously granted applications will invariably "lead to reversal," notwithstanding the Commission's aspirations to the contrary.

Equally significant, the plan to retroactively process this "limited category of [exceptional] cases" under the new rules resurrects the same legal and policy issues which were raised in the comments to the FNPRM and which persuaded the Commission to decide at least some of these cases under existing law in accordance with its statutory mandate. Transforming these construction authorizations into newly-filed applications will violate Section 405(b) of the Act by staying enforcement of the prior application grant without any special Commission order. Unless these incumbents prevail in the auction scheme imposed by the R&O, their facilities, subscribers, good will, etc. will descend (probably at huge discounts) to the highest bidders for the underlying authorizations. This economic loss, potentially substantial in many instances, will result from rehearing petitions

that have never been subject to agency scrutiny as required by Section 405 of the Act.

For the foregoing reasons, the Commission must reconsider the disposition of previously granted 931 MHz applications that are subject to petitions for reconsideration and review set forth in the R&O. Rather than subjecting these applications to the new procedures, the pending petitions should be swiftly resolved in accordance with 931 MHz licensing procedures as initially established, applied and interpreted by the Commission.

III. RULES 22.539 AND 22.569 SHOULD EITHER BE RESCINDED OR SUBSTANTIALLY MODIFIED

As adopted by the R&O, Rule 22.539 re-codifies the "one-frequency at a time" policy established by predecessor Rule 22.525, thereby confining Part 22 operators to a single additional channel application within a circle whose radius is forty miles.[12/] In adopting Rule 22.539, the R&O deleted Rule 22.16(c) which required additional channel applications to be supported by a traffic load

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12/ As relevant here, Rule 22.539 states:

> The general policy of the FCC is to assign one paging channel in an area to a carrier per application cycle. That is, a carrier must apply for one paging channel, receive the authorization, construct the station, provide service to subscribers, and notify the FCC of commencement of service to subscribers (FCC Form 489) before applying for an additional paging channel in that area.

Rule 22.569 applies this same limitation to additional channel applications requesting authorization to provide paging service on paired, two-way mobile frequencies.

study of the licensed frequency.[13/] At the same time, the R&O toughened "one frequency at a time" by barring a prospective applicant from filing for an additional channel until its pending application has been granted, the proposed facility has been constructed, service to subscribers has commenced and the Commission has been notified of these developments by filing of a Form 489.

The Commission previously held that "one frequency at a time" governs applications acquired incident to a sale of an ongoing business.[14/] That Section 22.539's reach similarly extends to "incidental" applications appears self evident. For this reason, and because Rules 22.539 and 22.569 confer an unwarranted preference on narrowband PCS, the two rules must be amended or repealed on reconsideration.

A. The Subject Rules Will Obstruct Consolidation Among Traditional Paging Carriers

The paging industry is in the throes of an extensive consolidation as serious operators seek to attain economies of scale needed to compete with other incumbents and more sophisticated technologies like narrowband PCS.[15/] Through

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[13/] In adopting Rule 22.539, the R&O also deleted Rules 22.525 and 22.516. R&O, at App. A-32.

[14/] Lehigh Valley Mobile Telephone Co., 2 FCC Rcd 88, 89 n.5 (1987).

[15/] See Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Services (Notice of Proposed Rulemaking and Order), CC Docket No. 94-46, 9 FCC Rcd 2578, 2579 (1994) [hereinafter "Section 22.119 NPRM"]; Amendment of the

consolidation, acquiring carriers achieve both increased spectral efficiency (as duplicative facilities are eliminated) and expanded wide area coverage (as co-channel systems in adjacent areas are united under common ownership). Because consolidation results in increased spectral and economic efficiency while facilitating greater availability of service, paging industry consolidation will promote established agency objectives for mobile communications services and should be encouraged by the Commission.[16/]

By reaching pending applications included in the bona fide sale of an ongoing business, Rule 22.539 constitutes a significant restraint on consolidation. The new rules compel an acquiring carrier to determine whether a prospective acquisition will inadvertently nullify any of its pending applications. If so, the parties must choose from the following inexpedient options:

- severing the seller's applications from the transaction until such time as the applications have been granted and facilities "constructed";[17/]
- delaying the overall transaction until all pending applications are granted, constructed and serving subscribers; or
- dismissing the seller's applications.

Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz (Report and Order) PR Docket No. 93-35, 8 FCC Rcd 8318, 8318-20 (1993) [hereinafter "929 MHz R&O"]; Mike Mills, Metrocall Bids $400 Million for 2 Other Paging Firms, Wash. Post, Dec. 8, 1994.

16/ In an analogous circumstance, the Commission demonstrated its readiness to facilitate consolidation in the cellular industry. See Bill Welch, 3 FCC Rcd 6502, 6504 (1988).

17/ R&O, ¶¶ 32-33.

Stated simply, imposing Rules 22.539 and 22.569 on applications incidental to sale of a business will either delay these legitimate business transactions or compel sellers to discount the value of their pending applications to zero. Thus, the subject rules impose substantial regulatory costs on economic business deals and may, at the margin, preclude certain deals from proceeding. Absent an exception for "incidental" applications, Rules 22.539 and 22.569 will frustrate the paging industry's consolidation, an economic trend acknowledged with favor by this Commission.[18/]

B. Absent An Exception For Bona Fide Sales, The New Rules Will Subvert Longstanding Decisional Precedent

In Airsignal International, Inc.[19/] and McCaw Personal Communications, Inc.,[20/] the Commission acknowledged that pending applications are frequently among the assets conveyed in the sale of a bona fide, ongoing business. To facilitate sales, the Commission exempted such pending applications from Rule 22.31. Without the Airsignal exception, Rule 22.31 would cause such applications, after being amended subsequent to the transfer or assignment, to be classified as "newly-filed" and, as a result, subject to the Public Notice, petition to deny and other statutory

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18/ See Section 22.119 NPRM, 9 FCC Rcd at 2579; 929 MHz R&O, 8 FCC Rcd at 8318-20.

19/ 81 FCC 2d 472, 474 (1980).

20/ 60 Rad. Reg. 2d (P&F) 889, 897 (1986).

provisions applicable to newly filed applications.[21] The Commission concluded that subjecting pending applications to Rule 22.31 would restrict business flexibility and discourage new entrants, contrary to the public's interest in rendition of the best public service.[22]

Rules 22.539 and 22.569, when applied to applications conveyed in connection with a bona fide sale, are completely incompatible with the spirit of accommodation and support animating Airsignal and McCaw. Indeed, the encouragement Airsignal and McCaw provide for bona fide sales involving pending applications is completely extinguished by Rules 22.539 and 22.569 in cases where those applications are within forty miles of the buyer's own alternate channel applications. To preserve the rationale of Airsignal and McCaw, and to promote the ongoing trend of consolidation in the paging industry, Rules 22.539 and 22.569 should, at a minimum, be amended to exempt from their scope those pending applications acquired pursuant to a bona fide sale of an ongoing business.

C. The New Rules Unjustly Confer A Competitive Advantage On Narrowband PCS

Although the Commission elected to define narrowband PCS broadly, it simultaneously acknowledged that "advanced messaging and paging services" will be a "predominant" service within the

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21/ See Section 22.31 of the Commission's Rules, 47 C.F.R. § 22.31.

22/ Airsignal, 81 FCC Rcd at 474. The Commission indicated that its main concern with enforcing the cut-off rule was to ensure that ownership amendments be for a legitimate business purpose and not primarily for acquiring pending applications. Id. at 475.

narrowband PCS category.[23] By this determination, the Commission recognized that narrowband PCS, when configured as an advanced paging service, will compete directly with traditional one-way paging. Indeed, the Commission anticipates that PCS will seek to satisfy new demands for mobile communications services which existing one-way paging technology, inter alia, cannot "fully" meet.[24]

Notwithstanding the competitive tension between advanced, narrowband PCS paging and conventional RCC paging service, Rules 22.539 and 22.569 burden only the latter with the shackle of "one [20 kHz] frequency at a time." No comparable constraint impinges upon prospective narrowband PCS licensees who may simultaneously prosecute applications and construct authorizations for as many three nationwide and/or regional licenses of 50 kHz each, which, on a paired basis, can aggregate up to 300 kHz of spectrum, versus the 20 kHz limitation imposed on a rival RCC. This disparate treatment of narrowband PCS and conventional RCC paging greatly offends the statutory command that services like narrowband PCS and RCC paging,

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[23] Amendment of the Commission's Rules to Establish New Personal Communications Services (First Report and Order), GEN Docket No. 90-314, 8 FCC Rcd 7162, 7163, 7164 (1993).

[24] Amendment of the Commission's Rules to Establish New Personal Communications Services (Notice of Proposed Rule Making and Tentative Decision), GEN Docket No. 90-314, 7 FCC Rcd 5676, 5687-88 (1992).

which have both been classified as CMRS, must be subject to comparable technical and operational rules.[25/]

Former Rule 22.525, predecessor to Rules 22.539 and 22.569, was adopted in an era when RCC paging applications were assigned either "first-come, first-served" or by lottery, and spectrum availability was constrained.[26/] Such conditions encouraged frequency warehousing and speculation; "one frequency at a time" was devised as an appropriate antidote.

Today, paging spectrum has been greatly expanded by allocations of multiple 929 and 931 MHz channels. Moreover, under new CMRS Rules,[27/] all RCC spectrum subject to mutually exclusive applications will be assigned by auctions, thus imposing a tangible economic penalty on any entity that acquires an RCC channel by competitive bidding and then warehouses it. Because these steps have already alleviated the conditions that stimulated speculation and stockpiling of RCC spectrum, it is irrational and unfair to continue to saddle RCC paging with a "one [20 kHz] frequency at a time" rule, while narrowband PCS faces no such restraint. For this

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25/ Implementation of Sections 3(n) and 332 of the Communications Act (Third Report and Order), FCC Rep. No. 94-212, GN Docket No. 93-252, released September 23, 1994, ¶ 4 [hereinafter "CMRS Third R&O"].

26/ See Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service (Memorandum Opinion and Order on Reconsideration), GEN Docket No. 80-183, 92 FCC 2d 631, 634 (1982).

27/ CMRS Third R&O, supra note 25, ¶¶ 328-29.

reason, Rule 22.539 and, to the extent it pertains to one-way paging, Rule 22.569 should be rescinded on reconsideration.

IV. THE R&O's DEFINITIONS OF "INITIAL" AND "MODIFIED" APPLICATIONS ARE PREJUDICIAL AND SHOULD BE REVERSED

The definitions of "initial" and "proposed" 931 MHz applications adopted in the R&O should be rejected and reformulated because they will:

- impede the growth of expanding local and regional 931 MHz systems;
- discriminate against 931 MHz paging, relative to 929 MHz paging and narrowband PCS contrary to the Budget Act; and
- confer a vast and inexplicable windfall on tower and site owners.

A. Absent Reversal, Expansion Of Local And Regional 931 MHz Systems Will Be Artificially Constrained

The definitions for 931 MHz "modification" and "initial" applications adopted in the R&O will substantially inhibit networks in this frequency band that are evolving to provide wide-area metropolitan and regional coverage. For many carriers, this process is incremental-- cash flows from existing operations fund the investment needed to expand existing facilities. The new rule is antithetical to that process; carriers poised for expansions entailing addition of transmitters more than two kilometers from existing sites will face the risks and vagaries of mutually exclusive applications, petitions to deny, and competitive bidding, rather than a clear expectation that they can extend their coverage

footprint consistent with their financial capabilities, on the one hand, and the needs of the marketplace, on the other.

B. The New Definitions Discriminate Against 931 MHz Paging

Equally important, the proposed definitions will create a sharp disparity between 931 MHz wide-area systems and competing private carrier systems operating on exclusive 929 MHz channels or narrowband PCS. Under recently implemented rules, 929 MHz licensees operating on exclusive frequencies have been immunized from competing, mutually exclusive applications when they:

- relocate or add transmitters more than two kilometers from existing sites in the interior of their systems;[28] and
- relocate or add transmitters more than two kilometers from existing sites on the perimeter of their systems.[29]

As already demonstrated, 931 MHz licensees could face competing, mutually exclusive applications in both these situations if the definitional regime proposed by the R&O is implemented. As a consequence, a 929 MHz system will have considerably more flexibility than its 931 MHz rival to expand facilities to accommodate changing demand conditions. The R&O provides no justification for bestowing 929 MHz carriers with this significant competitive advantage.

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[28] See Section 90.495(a) of the Commission's Rules, 47 C.F.R. § 90.495(a).

[29] See Section 90.495(f) of the Commission's Rules, 47 C.F.R. § 90.495(f).

This rule also disadvantages 931 MHz carriers relative to narrowband PCS. Narrowband PCS is licensed by market area, thus avoiding the threat of MX applications when systems are expanded within the licensed area. Thus, with respect to system expansion, 931 MHz suffers a distinct disadvantage compared to 929 MHz and narrowband PCS. Yet, 931 MHz, 929 MHz and narrowband PCS all constitute CMRS; as such, the Budget Act mandates that these separate but closely related services face comparable technical and operating requirements.[30/]

C. The New Definitions Bestow An Exorbitant Windfall On Site Owners

Whatever the framers' intentions, the proposed definitions provide an enormous economic windfall to site and tower owners and lessors who provide space to 931 MHz licensees. This windfall is unrelated to marketplace values or laws of supply and demand, but is an inevitable consequence of the definitions' inherent rigidity and impracticality.

Under the R&O's framework, parties leasing antenna space for 931 MHz facilities now have an indisputable incentive to terminate existing arrangements and demand exorbitant rent increases and other concessions from licensees. To elude this extortion, the licensee must either acquire and license a substitute site within two kilometers of the subject site, or file an "initial" application and pray that no MX (and auction) ensues. If no

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30/ The Budget Act requires that all services reclassified as CMRS be "subjected to technical [and operational] requirements that are comparable. . . ." Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(d)(3) (1993).

alternate site can be obtained within the two kilometer limit imposed by the new definition of a "modification" application, the only option certain to avoid a potential auction is to accede to the landlord's coercion. Faced with these choices, it is safe to predict that many licensees will submit to the landlord's demands, thus fostering a situation that is ripe for exploitation by owners and lessors.

D. The Proposed Solution Of Market-Based Licensing Is Illusory

The R&O states that "[the Commission] would like to consider market area licensing for paging operators in a future rule making proceeding."[31/] Although ProNet strongly supports market area licensing for systems licensed on RCC spectrum, such a vague promise of Commission action, by itself, cannot alleviate the concerns raised by the new definitions.[32/] There is no guarantee that the Commission ever will institute such a rule making proceeding; and even if it did, there is no guarantee of its outcome. Therefore, because these new definitions will govern 931 MHz applications for the foreseeable future, they must be amended

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31/ R&O, ¶ 105.

32/ The R&O instructed the Common Carrier Bureau, before the effective date of the new rules (i.e., January 1, 1995), to resolve or prepare for Commission resolution all 931 MHz applications previously granted but subject to petitions for reconsideration and all such applications subject to applications for review, respectively. R&O, ¶ 99. As of December 19, 1994, over three months after the new rules' were adopted, and just two weeks from their effective date, neither the Bureau nor the Commission has acted on a single petition for reconsideration or application for review.

in order to allow 931 MHz systems to compete effectively with its 929 MHz and narrowband PCS counterparts.

V. CONCLUSION

As demonstrated above, provisions of the R&O are seriously adverse to operators of conventional RCC systems, especially 931 MHz band operators. Particularly detrimental are policies and rules relating to retroactive imposition of a new 931 MHz processing procedure on pending applications, implementation of "one frequency at a time" (especially with respect to applications acquired incident to the sale of a bona fide, ongoing business), and establishment of new definitions for "initial" and "modification" 931 MHz applications. ProNet has explained why each of these provisions should be repealed or revised on reconsideration.

Viewed collectively, however, these deficiencies in the R&O are symptomatic of a more general, conceptual inadequacy concerning the Commission's regulatory framework for RCC spectrum-- namely, licensing of these frequencies on an individual transmitter basis. Juxtaposed to the growth and consolidation that typifies the conventional paging industry today, this licensing approach is simply anachronistic.

In the last decade of the twentieth century, paging systems customarily comprise scores if not hundreds of transmitting sites covering vast geographic expanses. The constituent facilities include a sophisticated control network providing for simulcast